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Attorney General  
STATE CAPITOL  
Phoenix, Arizona 85007

Robert R. Corbin

September 27, 1982

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**ARIZONA ATTORNEY GENERAL**

INTERAGENCY

James E. Sarn, M.D., M.P.H., Director  
Arizona Department of Health Services  
1740 West Adams  
Phoenix, AZ 85007

Re: 182-102 (R82-049)

Dear Dr. Sarn:

You have requested our opinion on the following questions:

1. Does A.R.S. § 36-2804 permit the Department to request a private contractor to finance, in total, the design, construction and operation of a State hazardous waste facility?

2. Does A.R.S. § 36-2805 permit the selected facility contractor to collect commercial fees and remit a portion of those fees to the Director (ADHS) for deposit in the hazardous waste trust fund?

We understand that you envision that a contractor would undertake to design and erect all necessary structures at the State's hazardous waste site and then operate the facility in accordance with applicable regulations and contractual requirements at no cost to the State, if the contractor were assured of a long term contract and could collect a fee which would enable it to recover its costs of construction, expenses of operation and make a profit. We have, therefore, rephrased your first question as follows:

Is the Director authorized to execute a contract for the design, construction and operation of the hazardous waste disposal facility with a long term commitment in a

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manner that would assure the contractor's recovering its construction and operating costs and making a profit on the operation of the facility?

Essentially, the Director's pertinent powers are contained in A.R.S. § 36-2804.A which states:

The director shall contract for the construction and operation of a hazardous waste disposal facility.

Unfortunately, the statute does not provide for the nature of the contract(s), the number of contractors or the source of funds with which to construct and operate the facility. Moreover, the Legislature has not by appropriation authorized the expenditure of any state moneys for the construction and operation of the facility. Arguably, the Legislature may have intended the kind of arrangement about which you have inquired, but the legislation is totally silent in that regard. We, therefore, must rely on general legal principles, as well as other portions of the chapter relating to hazardous waste disposal referred to below, to provide some guidance as to the extent of the Director's contracting powers contemplated in A.R.S. § 36-2804.

The Director is required by A.R.S. § 36-2802 to:

. . . acquire clear title in the name of this state to a site . . . for a hazardous waste disposal facility . . . (and may do so by)  
. . . purchase, lease, lease-purchase, grant, condemnation or other lawful means.  
(Emphasis added.)

We find no authority for the Director to alienate, encumber or lease the State's interest in the land to be acquired as a site for the hazardous waste disposal facility, but only to contract for the construction and operation of a facility thereon. A contractor's interest in the hazardous waste site, therefore, may not be any more than what would be best described as a license to use the site for contract purposes.

As a general principle, structures placed on land by a licensee become the property of the landowner when affixed to

the land.<sup>1/</sup> Nothing in the statutory scheme indicates that the Legislature intended that facilities constructed on the site would not become the property of the State. We conclude, therefore, that facilities constructed on the site become state property when affixed.

Inasmuch as you are authorized to contract for the construction and operation of facilities which are to become state property, we would assume that you, therefore, would be authorized to obligate the State to pay for the cost of construction and operation. You may, however, obligate the State to pay only to the extent of funds available for the fiscal year in which an obligation arises. Duff v. Jordan, 82 Ariz. 228 (1957).

By not enacting an appropriation authorizing you to obligate the State for the cost of construction and operation, the Legislature has not authorized you to enter into any contract that purports to obligate the State. This leaves only the alternative that you suggest; namely, that you contract with someone to construct and operate the facility at no cost or obligation to the State.

If the State cannot be obligated to pay the contractor(s) for the construction and the operation of the facility, then the contractor must resort to payments directly from those who dispose of wastes in the facility. This might be appropriate had the Legislature not enacted A.R.S. § 36-2805. This statute authorizes the Director of the Department of Health Services to "assess commercially reasonable fees for the use" of the hazardous waste disposal facility, collect the amount due and remit them to the State Treasurer for deposit in a special fund. The moneys in the fund are available to the Director to (1) monitor the operation of the site(s) and (2) mitigate or abate health or environmental threats caused by the site(s).

If proper controls are utilized, such as predetermined and audited accounting procedures and fidelity bonds, we see no reason why a site operator could not collect the user fees. The entire fee, however, is required to be remitted to the

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1. Hereford V. Pusch, 8 Ariz. 76, 68 P. 547 (1902); Salyer v. Schmit, 72 Ariz. 174, 232 P.2d 116 (1951).

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State Treasurer because its use is limited by A.R.S.  
§ 36-2805. This statutory scheme appears to preclude the  
facility operator from collecting any fees from which he could  
recover his construction costs and operation expenses.

We recommend that you seek legislation that will  
authorize you to proceed in the manner about which you inquired  
or that will provide adequate funding for you to execute the  
current statutes.

Sincerely,



BOB CORBIN  
Attorney General

BC:WJW:lm